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No.

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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD L. BURSTEN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11

CITATIONS

Cases:

Bursten v. *United States*, 395 F.2d 976 (5th Cir. 1968) 3

Chapman v. *California*, 386 U.S. 18 (1967) 5, 6 10

DeMayo v. *United States*, 32 F.2d 472 (8th Cir. 1929) 9

Desmond v. *United States*, 345 F.2d 225 (1st Cir. 1965) 2, 6, 7, 8

Griffin v. *California*, 380 U.S. 609 (1965) 6, 7, 10

Rodriguez-Sandoval v. *United States*, 409 F.2d 529 (1st Cir. 1969) 2, 6, 7, 8, 9

United States v. *Bursten*, 453 F.2d 605 (5th Cir. 1971) . . 1

United States v. *Handman*, 447 F.2d 853 (7th Cir. 1971) 6, 9, 10

Wilson v. *United States*, 149 U.S. 60 (1893) 9

Constitution:

U.S. Const. amend. V 3

Statutes:

18 U.S.C. §3231 2
26 U.S.C. §7201 3
26 U.S.C. §7206(1) 3
28 U.S.C. §1254(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

LEONARD L. BURSTEN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Leonard L. Bursten petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 28, 1971.

OPINION BELOW

The Opinion of the Court of Appeals (App. A, pp. 1-16)* is reported at 453 F.2d 605.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 28, 1971. (App. A, pp. 1-16). On March 9, 1972, the Court of Appeals denied Petitions for Rehearing and for Rehearing *en banc*. (App. B, pp. 17-18). On March 30,

*"App." references are to Appendixes to Petition for a Writ of Certiorari filed herewith.

1972, Mr. Justice Powell extended to May 8, 1972, the time within which to file a Petition for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 18 U.S.C. §3231.

QUESTION PRESENTED

After a jury trial, Petitioner was convicted of tax evasion. In closing argument to the jury, the prosecutor commented on Petitioner's failure to testify. Petitioner made timely objection to the comments, but the trial court did not take immediate or effective action to dispel their prejudicial effect. On appeal, the United States Court of Appeals for the Fifth Circuit held that the prosecutor's infringement of Petitioner's right not to testify was cured by the trial court's routine jury instructions that "closing arguments [are] not evidence" and that "the jury should base its verdict solely on legally competent evidence" (App. A, p. 13). These general instructions did not refer to the specific offending comments.

The question presented is whether the giving of such routine and general jury instructions discharges a trial court's duty promptly and effectively to cure infringement of an accused's right not to testify.

In holding that a prompt and specific instruction was not required to correct the proscribed comments in this case, the opinion of the court below is in conflict with decisions of the United States Court of Appeals for the First Circuit in *Desmond* v. *United States*, 345 F.2d 225 (1965) and *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (1969).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to The Constitution of the United States provides, in pertinent part, as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

On October 12, 1965, Petitioner was charged by the Federal Grand Jury for the Southern District of Florida in a two-count indictment alleging: (1) that Petitioner had wilfully attempted to evade and defeat the federal income tax owed by him for the calendar year 1957, in violation of 26 U.S.C. §7201; and (2) that Petitioner had made and subscribed an individual federal income tax return, not believing it to be true and correct, in violation of 26 U.S.C. §7206(1). Petitioner was first tried in March 1966, at which trial count two of the indictment was dismissed by the trial court at the close of the Government's case. A conviction on count one was later reversed by the Fifth Circuit, and Petitioner was granted a new trial. *Bursten* v. *United States*, 395 F.2d 976 (5th Cir. 1968). The judgment of conviction in issue herein was entered by the trial court at the close of Petitioner's second trial, on June 4, 1970.

At that trial, the Government sought to prove that the manner in which two transactions were reported on Petitioner's 1957 tax return constituted a wilful attempt to evade taxes for that tax year. Petitioner decided not to testify, and the defense rested at the close of the Government's case. Then, at the "charge conference," at which instructions to be given to the jury were discussed, Petitioner requested that the Court instruct as follows:

> You are hereby instructed that the defendant does not have any burden of calling any wit-

> nesses or producing any evidence. You may not draw any adverse inferences from the defendant's failure to call witnesses, or produce evidence in this case. That is to say, the government must prove, by competent evidence, beyond any reasonable doubt, each element of the offense charged. The defendant may properly rely on the government's burden and rest his case without calling any witnesses, or producing any evidence. You may not draw any adverse inferences, or inferences of guilt from the fact that he does so elect. (Petitioner's Requested Instruction No. 22) [App. C, p. 19].

Although it first agreed to give a portion of the submitted instruction, the trial court ultimately refused to give any instruction specifically directed to the defense's failure to produce any evidence. The trial court deemed the requested charge already covered by its routine instructions on burden of proof and the accused's right not to testify. (App. D, pp. 20-22). Petitioner's objection to the trial court's denial of the requested instruction was duly noted. (*Id.* at p. 22).

Following the charge conference, counsel delivered closing argument to the jury. The prosecutor's initial summation concluded by calling Petitioner "a cheat," and vouching to the jury that Petitioner was guilty. Petitioner's counsel argued, stressing the failure of the Government to prove its case on certain specific elements. The prosecutor then began a brief rebuttal by asking the jury to compare the respective opening statements of counsel in the light of what later had actually been proved by prosecution and defense. The prosecutor concluded his remarks as follows:

> * * * *I submit to you that the defense panicked in this case.* I submit to you they didn't think the Government could do it. It did go back some years. Kadison showed up. Sawyer showed

> up. Burris showed up. Adcock showed up. *They panicked. They couldn't put on a defense, I submit to you. That's what happened.* [App. E, p. 24; emphasis added].

In the context of this case, the quoted remarks asked the jury to draw an adverse inference from Petitioner's failure to testify, and the Court of Appeals apparently so viewed them.

Petitioner's counsel promptly objected to the quoted remarks and moved for a mistrial. The trial court overruled the objection and denied the motion. After a recess was taken, the trial court instructed the jury, omitting any specific reference to the closing remarks of Government counsel. The court did, however, praise counsel for their "great zeal and skill in the representation of their clients." (App. F, p. 26).

In the Court of Appeals, Petitioner contended that the prosecutor's rebuttal argument was prejudicial and impermissible in its reference to defense's opening statements and its charge of "panic" and inability to put on a defense. Although the Court was "unable to affirmatively state that the prosecutor's comments . . . were properly within the realm of a fair response to defense argument," it held that error inherent in such comments was cured by the District Court's routine instructions–delivered without specific regard to such comments–"that the closing arguments were not evidence and that the jury should base its verdict solely on legally competent evidence." Because such instructions had been given, the Court held that the prosecutor's comments "did not constitute prejudicial error" under *Chapman* v. *California*, 386 U.S. 18 (1967).

REASONS FOR GRANTING THE WRIT

This case presents an issue of major significance as to appropriate trial court response to prosecutorial comments on a defendant's failure to testify. Such comments are constitutionally proscribed by the Fifth Amendment, whether they draw jury attention to the accused's silence expressly (*Griffin* v. *California*, 380 U.S. 609 (1965)), or by implication (*United States* v. *Handman*, 447 F.2d 853, 855 (7th Cir. 1971)). By ruling that such offending comments can be "cured" by general jury instructions given as a part of the trial court's routine charge, the Fifth Circuit has significantly impaired this established constitutional protection. In so doing, the Fifth Circuit has created a conflict between its decision and decisions of the United States Court of Appeals for the First Circuit in *Desmond* v. *United States*, 345 F.2d 225 (1965) and *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (1969), and has effectively nullified this Court's ruling in *Chapman* v. *California*, *supra*.

There can be no question but that, in the context of this case, the remarks made by the prosecutor in his summation pointedly invited the jury to draw adverse inferences from Petitioner's silence. As expressed in *Desmond*, the standard is:

> Unless it is apparent on the record that there was someone other than himself whom the defendant could have called, the comment of necessity pointed to the only person who could have offered the contradiction, the defendant himself. [345 F.2d at 227]

There is no indication in the present case that anyone other than Petitioner could have contradicted the prosecution evidence on the critical elements of the offense charged, particularly the element of intent. The jury would, thus, inevitably look to Petitioner alone to rebut the points that the prosecutor urged. Indeed, the trial

court's view, articulated at the "charge conference," that the requested instruction on the defense's failure to put on any case was superfluous because the court had already decided to charge on Petitioner's own right not to testify, demonstrates that the trial court here made the same fatal linkage that the jury did. On this record, the conflict with the cited First Circuit decisions is clear.

In *Desmond, supra*, a case decided within weeks of *Griffin*, the prosecutor stated in closing argument that Government evidence on a key narcotics transaction stood "unimpeached and uncontradicted." The trial court overruled a defense objection to this comment, but added that it would later charge the jury that no inference adverse to the defendant should be drawn from his failure to testify. Although the promised charge was ultimately given, the First Circuit held that general instructions did not cure the error. In reversing the conviction, the Court said:

> Correction of error should be as prompt and timely as possible—particularly where the error involves the infringement of a constitutional right, as this did. Griffin v. State of California, 85 S.Ct. 1229, 4/28/65. The appellant promptly objected. The remedy, to be fully effective, should have been administered equally promptly. Smith v. United States, 9 Cir., 1959, 268 F.2d 416, 420; White v. United States, 1962, 114 U.S. App. D.C. 238, 314 F.2d 243. [345 F.2d at 226-227].

Later, in *Rodriguez-Sandoval, supra*, Government counsel argued to the jury that the evidence against the accused was "uncontradicted," and that "there is no evidence to the contrary." No exception was taken to these remarks. The trial court, nevertheless, instructed the jury that "[a] defendant is not required to testify in a criminal case and no presumption of guilt is raised and no inference of any kind may be drawn from the

failure of a defendant to testify." 409 F.2d 530, n. 3. The First Circuit reversed the defendant's conviction, saying:

> We think there was plain error here within the meaning of Fed. R. Crim. P. 52(b). Defendant's constitutional right not to testify was infringed. To begin with, although there was a certain sublety to the prosecution's remarks, the error was extremely aggravated from the quantitative standpoint. The prosecution hammered the point home relentlessly, stating in at least five different ways that its version of the December 26 happenings was uncontradicted. See Chapman v. California, 386 U.S. 18, 26, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). Compare United States v. Goitia, 409 F.2d 524, decided by this court today; also see Holden v. United States, 393 F.2d at 277. In such a case we are unwilling to allow the government to act improperly and then avoid reversal by the unprovable assertion that grievous prejudice probably did not result.
>
> Indeed, the very persistence of the government in making these remarks is proof that it attached much importance to them. We do not say that the government was contumacious. It doubtless believed that its remarks were at least arguably consistent with our decisions. But one who attempts to define exactly the edge of the precipice approaches at his peril. [409 F.2d at 531].

In the present case, there was greater need for immediate "cure" of the prosecutor's remarks than in *Desmond* and *Rodriguez-Sandoval*. In those cases, the prosecutorial comments only directed attention to the objective fact of a lack of rebuttal evidence, which could have been ascribed by the jury to neglect, loss of records, *etc.* In the instant case, the prosecutor expressly attributed such lack to panic, and to an alleged inability to "put on a defense." These charges

of "panic" and "inability" suggested to the jurors that Petitioner had a "guilty fear" of testifying.

In *Rodriguez-Sandoval*, the First Circuit ruled that a routine jury instruction on the accused's right not to testify failed to dispel the prejudical effect of the prosecutor's comments, even though timely objection to such comments had not been asserted. In the instant case, where prompt objection was made, the court below held that even more perfunctory instructions, such as those dealing generally with the nature of closing argument, could achieve this cure. It should be noted that the comments which compromised Petitioner's rights here were not "subtle," like those in *Rodriguez-Sandoval*.*

A jury cannot be expected to infer from routine instructions that it must specifically disregard an inflammatory prosecutorial comment made at a different time. *United States* v. *Handman*, supra at 855. As early as 1893, this Court held that a "direct prohibition or emphatic condemnation" is required by the trial court when offending comments on failure to testify are made. *Wilson* v. *United States*, 149 U.S. 60, 67 (1893). More than forty years ago, the United States Court of Appeals for the Eighth Circuit ruled that the Fifth Amendment is satisfied in such situations only if a trial court "sharply, emphatically, and promptly advises the jury that the matter is improper and that they should give no consideration thereto.'" *DeMayo* v. *United States*, 32 F.2d 472, 475 (8th Cir. 1929).

*This case does not involve the issue whether the prosecutor's comments were "fair reply" to prior argument of defense counsel. The Fifth Circuit, after an extensive analysis of Government assertions of "fair reply," declined to decide the case on this basis. The appeals court was "unable to affirmatively state that the prosecutor's comments . . . were properly within the realm of a fair response to defense argument" and observed that "[t]he comments at issue are, if within the balance of permissible fair reply, at the very margin of that doctrine." (App. A, pp. 11-12).

From the foregoing, it is clear that the trial court in the instant case should not have relied on its "mild" general instructions to cure the prosecutor's comments. If given at the time of such comments, and with direct reference thereto, a jury instruction as to Petitioner's right not to testify might have mitigated the error. The preferable approach would have been for the trial court to deliver a specific admonition tailored to the particular offending remarks, to dispel their effects immediately and prevent their repetition. As the Seventh Circuit held in *Handman*:

> A cautionary instruction should have been given by the court promptly to erase any prejudice harbored by the jury because of Handman's failure to challenge or contradict Solomon's testimony. Id., 346 F.2d at 226-227; see Rodriquez-Sandoval v. United States, 409 F.2d 529, 530 (1st Cir. 1969). The general instruction given at the close of evidence would most likely be ineffective for that purpose. [447 F.2d at 855].

In *Chapman* v. *California, supra*, this Court stated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. In the instant case, could the Fifth Circuit have properly held, "beyond a reasonable doubt," that the trial court's routinely-delivered jury instructions rendered the constitutional error "harmless"? In fact, the Fifth Circuit lifted the burden imposed by this Court in *Chapman*. If the decision of the Fifth Circuit stands, a reversal under *Chapman* could never be obtained on *Griffin* grounds, no matter how extreme the prosecutorial comments.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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INDEX

	Page
APPENDIX A – Opinion Below	1
APPENDIX B – Order Denying Petition for Rehearing *en banc*	17
APPENDIX C – Petitioner's Requested Instruction No. 22	19
APPENDIX D – Charge Conference Excerpt	20
APPENDIX E – Government Counsel's Rebuttal Argument	23
APPENDIX F – Trial Court's Charge to the Jury	26

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEONARD L. BURSTEN,
Defendant-Appellant.

No. 71-2139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEONARD L. BURSTEN,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(December 28, 1971)

Before BROWN, Chief Judge, PHILLIPS* and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: The direct appeal from appellant Bursten's conviction for violation of 26 U.S.C. §7201 is the subject of appeal No. 30224. Appeal No. 71-2139 is an appeal from the denial of appellant's motion for a new trial. These appeals have been consolidated at the request of the parties.

The conviction at issue followed this court's reversal of appellant's prior conviction on the same indictment. Since the underlying facts adduced in both trials are the same, we need only briefly state the facts relevant to this appeal, and we refer the reader for a fuller exposition of the underlying facts to this court's prior opinion in *United States v. Bursten*, 395 F.2d 976 (5th Cir., 1969).

The focus of our attention is a 1957 tax return filed by Bursten in 1960. Appellant's entries on that return indicated that no tax liability had accrued for the taxable year 1957, nevertheless on the line reserved for entry of tax due the Government, appellant entered the phrase: "Please compute and bill if owed." After an extensive audit of this return, the Government disallowed certain claimed capital losses, and in 1965 obtained the subject indictment.[1]

---

*Of the Tenth Circuit, sitting by designation.

[1] "That on or about the 9th day of May, 1960, in the Southern District of Florida, the defendant,

LEONARD L. BURSTEN

late of Miami Beach, Florida did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1957, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Jackson-

As noted, this appeal is from appellant's second trial on the indictment. This time the trial was unmarred by the procedural infirmities which had marked his first trip to the bar as a criminal defendant.[2] He here, however, asserts five grounds for reversal: (1) that the Government's failure to prove that appellant's tax return contained the language attributed to it by the grand jury precludes his conviction; (2) that the prosecutor's argument was so improper as to require reversal; (3) that appellant was entitled to have the jury instructed that it draw no inference from the defense resting without adducing evidence, and that it not infer that a lawyer defendant has any greater knowledge of the tax laws than any other citizen; (4) that the Government's evidence was adduced in violation of the parol evidence rule; and (5) that the prosecutor's argument about Bursten's criminal intent was in contradiction to the evidence. In No. 71-2139 appellant asserts that the trial court erred in denying his motion for a new trial based on newly discovered evidence. After review, we have determined that Bursten's conviction must be affirmed. Our following discussion is limited to those arguments advanced of plausible merit.

---

ville, at Jacksonville, Florida, a false and fraudulent income tax return wherein he stated that he did not have any taxable income for said calendar year and that no tax was due and owing, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $152,767.14, upon which said taxable income he owed to the United States of America an income tax of $93,093.40; in violation of Title 26, United States Code, Section 7201."

A second count was dismissed prior to trial.

[2] Bursten has been an attorney and served for a time as an Assistant United States Attorney in Wisconsin.

I.

Appellant's first point of appeal was stated to be "[w]hether the conviction was precluded by the Government's failure to prove that Appellant stated in his 1957 Income Tax Return that 'no tax was due and owing.'" This issue raises the problems of a variance between an indictment which a grand jury has returned and proof adduced at trial. Here, the grand jury's indictment alleged that Bursten had stated on his 1957 tax return that no tax was due and owing. At trial, however, the evidence adduced irrefutably demonstrated that the subject return did not use the quoted language. Instead, on the line reserved on Form 1040 for computation of tax liability, it showed that appellant had entered the language: "Please compute and bill if owed." Bursten here asserts that this difference between allegation and evidence was an "effective" amendment of a grand jury indictment and requires reversal.[3]

The cases considering this problem have drawn a distinction between the "effective" amendment of the grand jury indictment which requires reversal,[4] and less material variances which do not destroy a defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury, and thus, such a lesser variance may be harmless.[5]

[3] An "effective" amendment of an indictment is said to occur when the allegations of the indictment and the proof adduced at trial are materially different. *Stirone v. United States*, 361 U.S. 212 (1960).

[4] *Stirone v. United States, supra; United States v. Fischetti and Gillette*, ___ F2d ___ (5th Cir., 1971) [No. 71-1175, October 27, 1971]; *United States v. Beard*, 436 F.2d 1084 (5th Cir., 1971); *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir., 1969).

[5] *Berger v. United States*, 295 U.S. 78 (1935); *Nunnally v. United States*, 291 F.2d 205 (5th Cir., 1961); *United States v. Tremont*, 429 F.2d 1166 (1st Cir., 1970), cert. den., 400 U.S. 831 (1970).

The distinction has been articulated by the District of Columbia Circuit in *Gaither, supra,* where the court stated:

> "The courts have recognized two kinds of erroneous departure from the original indictment of a grand jury, each with its own standards governing prejudice. An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.
>
> "An amendment is thought to be bad because it deprives the defendant of his right to be tried upon the charge in the indictment as found by the grand jury and hence subjected to its popular scrutiny. A variance is thought to be bad because it may deprive the defendant of notice of the details of the charge against him and protection against reprosecution." 413 F.2d 1071-2.

The distinction has also been considered to turn on the question of whether the defendant was tried for some crime other than that upon which the grand jury had indicted. In *United States v. Beard,* 436 F.2d 1084 (5th Cir., 1971), the issue was raised and the court there stated that an infirmity arose, and we quote:

> "The only case ever presented by the prosecution to the Grand Jury necessarily was on the theory that the actions of the appellant constituted a violation of Title 18, U.S.C., Section 13, by reason of violation of the Texas embezzlement statute, Section 1534 of the Texas Penal Code. The appellant was tried and convicted for

> violating a wholly different statutory provision. Title 18, U.S.C., Section 661. Permission was not asked of or given by the trial judge for formal amendment of the indictment, but nevertheless the indictment was in effect amended by the government's change in position during the course of the trial when the fatal defects in the proof came to light, and the court refused to grant the motion to dismiss the indictment."

Bursten's case differs. This case is distinguished from *Beard* in that it is not a case of a grand jury indicting for an offense under one section of the United States Code and the prosecution proving guilt of a second and different offense. Appellant here was charged with a violation of 26 U.S.C. §7201. Considering the nature of appellant's tax return, a sufficient allegation of an offense under this section was made whether the grand jury alleged taxpayer's statements to be as they are on his return or as alleged in the indictment. Nor does *Janko v. United States*, 281 F.2d 156 (8th Cir., 1960), reversed on other grounds, 366 U.S. 716, require a contrary result. Further, we note that regardless of the language on line 12 of Bursten's return, the 1957 return was on its face a "loss" return and showed no taxable income had accrued.

Since there is no assertion, nor, as this is the second trial on the indictment, could there be, that appellant had no notice of the charge against him or of the kind of evidence to be introduced, we conclude that in the absence of a showing of prejudice to appellant the variance at issue was not material and was harmless. *Berger v. United States supra; United States v. Tremont, supra;* compare *United States v. Birrell*, 447 F.2d 1168 (2nd Cir., 1971).

II.

Appellant's second theory for reversal involves the scope of permissible prosecutorial argument. Bursten contends that the prosecutor's rebuttal argument was prejudicial and impermissible in that its reference to defense's opening statements and its charge of "panic" and "inability to put on a defense" amounted to a commentary on defendant's refusal to testify or conduct a defense. What is precisely at issue are the following statements:

> "You heard defense counsel get up here. I want you to remember what he told you in his opening statement. I am not going to go through it. Remember what he told you, and remember, please, that I told you that this is what we expected to prove, what he hoped to prove.
>
> * * *
>
> "I say to you and I ask you to remember that the Government told you to look at the evidence in the case, see if the Government did what it told you that it hoped to prove, what it expected to prove, and thing [sic] about what the defense told you–
>
> * * *
>
> "I submit to you that the defense panicked in this case. I submit to you they didn't think the Government could do it. It did go back some years. Kadison showed up. Sawyer showed up. Burris showed up. Adcock showed up. They panicked. They couldn't put on a defense, I submit to you. That's what happened." [See 395 F.2d 976 for background.]

Fairness, in considering the propriety of prosecutorial comments, requires that the context and circumstances of the statements be considered.

Appellant's defense as indicated by his attorney's closing remarks was based upon the belief that the prosecution had failed to prove its case beyond a reasonable doubt. Consequently, Bursten rested at the close of the Government's case without calling any witnesses. In summation to the jury defense attorneys argued:

> "Going now to the question that I hope to present to you, ladies and gentlemen, is a fact that I say in this case, I submit, that the evidence clearly demonstrates that the Government has failed miserably, patently in discharging the burden, its burden in the case, to prove beyond a reasonable doubt that all of the evidence involved in the offense existed.
>
> "We say they didn't prove these elements and we rested. We rely on the fact that if the Government has not made up its case, that we don't have to go forward. That's how strongly we felt about it.
>
> * * *
>
> "Now, let's go to the $140,000 question. What evidence is there—what did the Government present—and they have the burden here, and Mr. Alexander recognized it, and he is sweet, a very fine chap, and I lik (sic) him very much. He is sincere.
>
> "He tells you, and I agree with him, that the Government has the burden, and this is a heavy burden, members of the jury. It must be a heavy burden. We are dealing with a fellow here, one for which you can be committed if found guilty. (sic)

"Now, they have a serious burden. It was the lack of their proving and satisfying that burden that we didn't go forward. We were convinced that they failed.

"Now, what did they come into Court and tell you about this $140,000 loss in the year 1957? What evidence did they bring to you to determine whether it, in fact, did or did not exist?

"The simple answer, again, can't be denied—it is none—they didn't come in and tell you or produce a witness to tell you that.

"They produced tons and tons of documents, and they produced witnesses, none of whom really bore into this case to a real serious extent, and some of whom were, of course, important to get the story from or the facts before you.

"However, where is the agent, the special agent or revenue agent who examined and investigated the 1957 return?

"They bring in the agent for the 1952, 1953, 1954 examination. They bring in Elledge, the chief of the Appellate Division then, but no one, not one agent, ladies and gentlemen, who investigated the 1957 return that we stand here to defend.

"Now, isn't it their obligation? It is their obligation to do so. Why didn't they bring that agent in here? Why didn't they bring the agent in here?

"Would it have been that that agent would have told you that there was a transaction that occurred in 1957, that there were discussions had with Mr. Bursten concerning that transaction?

* * *

"Now, then, ladies and gentlemen, it would have been very simple for them to have done this, to help prosecute this case and it would have made me go forward if they would have put that one agent on the stand to examine the books and records of Mr. Bursten and had him tell you that 'I examined those records. I examined his affairs,' and they do that. They can't tell you otherwise.

"Nowhere in my examination and in my investigation did I find any justification for this loss – that's all they had to tell you. That's all they had to tell me, and had they done that, I would have gone forward, but the burden is theirs, not mine. It is not our obligation, and this is important, so serious, so very serious.

"It is not our burden. It is their burden. They failed. They 'missed the boat'–if they had a case, and, no, they don't have a case, but in my opinion I think the evidence shows that.

"Now, could it have been that that witness, that agent, who was their agent, would have testified that that dispute existed? He didn't appear. They didn't even bring that agent to you. Why? What are they concealing? Are they going to try to convict the man and fail to produce all of the parties, the witnesses that they have, so that we can examine them–the Government, ladies and gentlemen, has not even denied with a witness that there was no 1957 transaction."

The prosecution's remarks, when viewed in proper perspective, are in the nature of a rebuttal to these arguments. The serious issue raised by the prosecution's arguments is whether they constituted an impermissible comment on the appellant's exercise of his privilege to

refrain from testifying and putting on a defense. Commentary on a defendant's exercise of his Fifth Amendment privilege or on his refusal to take the witness stand is constitutionally impermissible. *Griffith v. California*, 380 U.S. 609 (1965); *Chapman v. California*, 386 U.S. 18 (1967). Commentary on the defense strategy of putting the Government to its proof may, however, be proper so long as it does not amount to a veiled invitation to the jury to consider the defendant's refusal to testify. *Knowles v. United States*, 224 F.2d 168 (10th Cir., 1955); *United States v. Johnson*, 337 F.2d 180 (4th Cir., 1964); affirmed, 383 U.S. 169 (1965); *Doty v. United States*, 416 F.2d 887 (10th Cir., 1968). Not every characterization of the evidence or of the defendant's case made in the course of advocacy is to be taken as a comment on the defendant's refusal to testify. Cf. *Holden v. United States*, 393 F.2d 276 (1st Cir., 1968), but see *United States v. Broadhead*, 413 F.2d 1351 (7th Cir., 1969). Here the prosecution's request that the jury recall the opening statements and compare them with their recollection of the case was not a direct comment on appellant's refusal to testify, nor when taken in context does it naturally lead to such an inference. In view of the district court's cautionary instructions these comments did not constitute error.

This court, however, is unable to affirmatively state that the prosecutor's comments of "panic" and "inability to present a defense" which conceivably asks the jury to conclude that appellant had panicked because he had no case, and had no case because he was guilty, were properly within the realm of a fair response to defense argument.[6]

[6]The modern doctrine of fair response seems to have arisen from Judge Learned Hand's observations in *United States v. Feinberg*, 140 F.2d 592 (2nd Cir., 1944). Judge Hand there stated:

A United States Attorney is in a special position of trust and confidence with a jury. *Berger v. United States,* 295 U.S. 78 (1935); *Hall v. United States,* 419 F.2d 582 (5th Cir., 1969). As an advocate he is permitted to make a fair response to defense arguments. The doctrine does not, however, give him what the First Circuit has described as "a hunting license exempt from ethical constraints on advocacy." *Patriaca v. United States,* 402 F.2d 314 (1st Cir., 1961). He is at liberty to strike hard blows, but not foul ones. *Berger v. United States, supra.* The comments at issue are, if within the balance of a permissible fair reply, at the very margin of that doctrine. We need not, however, determine whether the comments fall on one side of the line or the other, nor need we determine where that line is to be drawn, for if erroneous the comments were

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> "The next complaint is that in his closing address the prosecutor commented upon the fact that none of the accused took the stand. At first blush this appears as a grave error, but on closer examination it turns out to have been quite justified. The record does not contain the closing address of the accused's counsel and we have it only from the version given by the judge, which was that counsel had said that the jury had heard all the testimony 'and the defendants, if they took the stand, could not add anything to that'; and that 'they had been interrogated thoroughly.' 'I know all the testimony. There would not be anything that they could add to what had been testified to.' *In so assuring the jury, the counsel invited their consideration of what the accused would have said on the stand, and surely he surrendered any privilege they had not to testify. He could not in justice ask that the prosecutor must accept his version unchallenged."* (Emphasis added.)

See *United States v. Broadhead,* 413 F.2d 1351 (7th Cir., 1969); *Babb v. United States,* 351 F.2d 863 (8th Cir., 1965); *Isaacs v. United States,* 301 F.2d 706 (8th Cir., 1962); Annot. 50 A.L.R. 2d 766 and later case service, collecting cases.

nonetheless harmless. Under F.R. Crim.P. 52(a)[7] and *Chapman v. California, supra,* prosecutorial comment such as that at issue may be harmless error and corrected by instruction. *United States v. Toler,* 440 F.2d 1242 (5th Cir., 1971); *United States v. Smith,* 436 F.2d 787 (5th Cir., 1971); *United States v. Reid,* 410 F.2d 1223 (7th Cir., 1969); *United States v. Broadhead, supra.* The case at bar is such a case. The district judge permitted the challenged argument as a fair response to defense arguments, but his instructions, both before argument and before the jury retired for its deliberations, stressed that the closing arguments were not evidence and that the jury should base its verdict solely on legally competent evidence. We have no indication that the jury failed to follow that instruction. We hold that, in light of the context of these arguments and of the district court's instructions, the comments did not constitute prejudicial error and are harmless beyond a reasonable doubt. *Chapman v. California, supra.* See Cameron and Osborn, *When Harmless Error Isn't Harmless,* 1971, Law & Soc. Order 23.

As another verse to appellant's refrain of impermissible prosecutorial argument, Bursten argues that the prosecutor committed plain error when he asked the jury to ascribe to appellant elements of intent which he knew were plainly and completely untrue and unsupported by the record. This point has been augmented by the record submitted in No. 71-2139. The substance of the objection goes to the following comments:

> "Let me show you something why I said his return is interesting. This return is filed on May

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[7]F.R.Crim.P. 52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

9 of 1960, and it's a 1957 return. It was due in April of 1958, but it wasn't filed until May of 1960.

"Just hold that in your minds for a moment and let me show you one other thing, if I may, on Exhibit 6.

"That return was signed on November 10 of '59, six months before the defendant got up courage to file it. He couldn't give up that money. He wasn't about to pay the Government any taxes, but it wasn't an easy decision.

"This is no negligence here. This was thought out and this was something about screwing your courage up—shall I file it, will they catch me, will they overlook it?

"I think he went through that for a couple of weeks and had the courage to sign it, but not enough courage to file.

"He stewed for a few weeks and then something happened. He worried some more. What is he going to do with that return?

"He didn't file it until after six months. He signed it, kept it around for six months. The promoter in him, he couldn't give it up, he just couldn't pay the Government a hundred thousand dollars and he couldn't pay the Government $32,000, so what did this man do that has the kind of mind that can develop another Miami Beach or think in those terms? He filed a return with that explanation and on the front of it he shows a loss, $14,000, against that $8,000 of other income. That leaves a loss, no tax due.

"What is the defendant doing?

"He is, I suggest, the type of person who always wants an insurance policy, something he

> can fuss about– if he gets caught, if the ball bounces the wrong way, and he put right on the return, "Please compute and bill if owed."
>
> "Please compute and bill what? What? What are we going to compute, if I may ask? There wasn't anything to bill and compute."

Bursten contends that this argument was outrageous, first because he asserts that the record established that the Government knew Bursten submitted his return directly to an Internal Revenue agent for immediate audit. He asserts that even with this knowledge the Government argued to the jury that Bursten did not. Moreover, the prosecutor argued, according to Bursten's version, that he had filed his return with the hope and expectation of avoiding audit, thus accomplishing his scheme of evading taxes. Bursten asserts that this is the equivalent of the knowing use of perjured testimony and requires reversal. *Miller v. Pate*, 386 U.S. 1 (1967); *Jackson v. Wainwright*, 390 F.2d 288 (5th Cir., 1968).

The issue is whether the prosecutor's argument was consistent with the evidence and, even if inconsistent, was it an intentional misstatement. We do not reach the question of intentional misstatements because in our view the comment was consistent with all the evidence before the jury and consistent with the reports of the Internal Revenue Service Agent who conducted the inquiry into the 1957 tax return.

The testimony of Agent Jaffe and of his reports was the subject of No. 71-2139. Jaffe's report, which was not introduced into evidence in No. 30224 but was introduced on the motion for new trial, clearly documents that Jaffe had contacted Bursten in December of 1959, or in early January of 1960. The objected to argument, of course, occurred in No. 30224, at which time the Jaffe report was not in evidence. The best

evidence, however, the 1957 tax return, was in evidence and supported the inferences which the prosecutor asked the jury to draw.

In connection with appellant's assertion of the impropriety of argument, we note that appellant's counsel in his closing following the prosecutor's remarks previously quoted stated:

> "In 1958 our return, as approximately pointed out by our eminent colleague, Mr. Alexander, was not filed until May of 1960. Whether it was filed late or not is not an issue in this case, but it is most significant to me, to you, ladies and gentlemen, I suggest. We know and the Government acknowledges, as they must, that the return was filed after these discussions had with Internal Revenue Service representatives."

We, therefore, find no merit in appellant's assertion in No. 71-2139 that the Government had violated its duties under the Jencks Act, 18 U.S.C.A. §3500, or under the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). The assertion falls of its own weight and merits no further discussion.

The judgment of conviction under appeal in No. 30224 is AFFIRMED. The appeal from the motion for new trial in No. 71-2139 is likewise AFFIRMED.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEONARD L. BURSTEN,
Defendant-Appellant.

No. 71-2139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEONARD L. BURSTEN,
Defendant-Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Dec. 28, 1971, 5 Cir., 1971, ___ F.2d ____)

(March 9, 1972)

U.S.A. v. LEONARD L. BURSTEN

Before BROWN, Chief Judge, PHILLIPS*
and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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*Of the Tenth Circuit, sitting by designation.

APPENDIX C*

DEFENDANT'S REQUESTED INSTRUCTIONS
[No. 22]

EFFECT OF FAILURE TO CALL WITNESSES OR PRODUCE EVIDENCE

You are hereby instructed that the defendant does not have any burden of calling any witnesses or producing any evidence. You may not draw any adverse inferences from the defendant's failure to call witnesses, or produce evidence in this case. That is to say, the government must prove, by competent evidence, beyond any reasonable doubt, each element of the offense charged. The defendant may properly rely on the government's burden and rest his case without calling any witnesses, or producing any evidence. You may not draw any adverse inferences, or inferences of guilt from the fact that he does so elect.

*Excerpt from page 740, Volume 2, Appendix, filed in *United States* v. *Bursten*, Docket No. 30224, United States Court of Appeals for the Fifth Circuit.

APPENDIX D*

THE COURT:

Now, we go to Number 22. This is marked as the defendant's requested instruction–titled "Effect of failure to call witness or produce evidence."

You are hereby instructed that the defendant does not have any burden of calling any witnesses or producing any evidence. You may not draw any adverse inference from the defendant's failure to call witnesses or produce evidence in this case, that is to say the Government must prove by competent evidence beyond any reasonable doubt each element of the offense charged.

The defendant may rely–pardon me–strike that.

The defendant may properly rely on the Government's burden and rest his case without calling any witness or producing any evidence.

You may not draw any adverse inference or inferences of guilt from the fact that he did so elect.

Do you have any opposition to that?

MR. ALEXANDER:

I believe I do.

THE COURT:

On what grounds?

MR. ALEXANDER:

Insofar as the defendant, of course, the defendant taking the stand–we have gone beyond that and now the defense has elected not to proceed and put on evidence–I think, for example, in the Government's case–I would argue that you heard nothing to the contrary, to A, B, and C; you have heard no other witness and as to

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*Excerpts from pages 589 through 592, inclusive, and page 594, Volume 2, Appendix, filed in *United States v. Bursten*, Docket No. 30224, United States Court of Appeals for the Fifth Circuit.

witnesses, whether equally available–I don't think you can draw an inference against either side, and this tends to say that the Government can't comment, in effect, on the fact that the defense didn't put any evidence on, which I think it can or I submit that it can, your Honor.

THE COURT:

Gentlemen, I have amended this.

Going now to the third unnumbered sentence, which reads "That is to say the Government must prove by competent evidence beyond a reasonable doubt each element of the offense charged"–everything after that I have deleted by striking it out and I have inserted–I have made an insertion there so this will now read and be given as–if counsel for the defense wants it given this way, as follows: You are hereby instructed that the defendant does not have any burden of calling any witnesses or producing any evidence. You may not draw any adverse inferences from the defendant's failure to call witnesses or produce evidence in this case. Wait a moment. I will have to work on it a little more.

Well, I have already, Mr. Wheeler, charged or I will have charged that there is no burden upon the defendant to prove his innocence, that it is the duty of the Government to prove his guilt beyond a reasonable doubt, and he stands before the law until he is proven guilty to the satisfaction of the jury beyond and to the exclusion of a reasonable doubt.

At this juncture I will have also charged that he may or he may not elect to take the stand according to his own notion and no inference adverse to him can be drawn because he didn't take the stand–that cannot be considered by the jury to his disadvantage.

I decline to give this charge. I have already charged–it is in my charge and this is just re-saying, perhaps, underscoring something which is already said and which I don't think needs it because I will make it real clear.

Let me have your copy of this. Do you have another copy of it? Give me a copy of it so I can mark on here–

MR. WHEELER:

I don't have another one. I am sorry.

THE COURT:

Well, let me put on here "Not given" because it is covered by the Court's charge. I will give this to you, Miss Herman. Here is No. 21, which I have marked for refused.

Now, does that wrap it up?

* * *

Now, at this time I want the record to show that each party has an objection or if he prefers to use the word, an exception–that's all right–to have requests that were not given and to have them, having been overruled with respect to the positions taken at the charge conference.

APPENDIX E*

MR. ALEXANDER:

Ladies and gentlemen of the jury, I am going to be very brief. You have heard enough argument. I am just going to make one or two observations that I think you ought to keep in mind.

You heard defense counsel get up here. I want you to remember what he told you in his opening statement. I am not going to go through it. Remember what he told you, and remember, please, that I told you that this is what we expected to prove, what he hoped to prove.

MR. WHEELER:

Your Honor, I don't mind too much, but opening statements are not evidence, as the Court instructed the jury, and these are other elements in this case. I am sure counsel knows about it, and I think he is trying to come in with a lot of under-the-table stuff.

I object to it, sir.

MR. ALEXANDER:

Your Honor, maybe I am in error, but–

THE COURT:

Proceed, and I will listen to it. If I hear something wrong, I will sustain the objection. I don't know what you are going to say yet.

MR. ALEXANDER:

Thank you, your Honor.

I say to you and I ask you to remember that the Government told you to look at the evidence in the case, see if the Government did what it told you that it hoped to prove, what it expected to prove, and think about what the defense told you–

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*Excerpt from pages 651 through 654, inclusive, Volume 2, Appendix, filed in *United States v. Bursten*, Docket No. 30224, United States Court of Appeals for the Fifth Circuit.

MR. WHEELER:

Objection, your Honor. What we say in opening statements he is referring to–

THE COURT:

The objection is overruled.

Ladies and gentlemen of the jury, you will base your verdict, like I have told you so many times, upon the evidence that came to you in the case and the charge that I give you on the law.

You may proceed.

MR. ALEXANDER:

Thank you.

Now I will pass on to another point. I am going to be very brief. I think you have been very patient, and I don't think your patience should be imposed upon.

Let us go to the Boca Ciega. It is very simple. You can go to the paper, but it didn't tell the whole story. That causeway was right in the middle there. Burris told you that, and that was the real addition to those agreements that the Greens had with Bursten, the defendant.

The defendant himself admitted that when he talked to Adcock. Let's not grab some paper and say it just did this. That didn't tell the whole story of the Boca Ciega deal, and I am not going to consider or I am not going to insult your common sense, which you are entitled to use, and under the American system you have to use it, because you are in a serious case. I am not going to insult your intelligence by saying any more on that.

There is one other point in that connection. I submit to you that the defense panicked in this case. I submit to you they didn't think the Government could do it. It did go back some years. Kadison showed up. Sawyer showed up. Burris showed up. Adcock showed up. They panicked. They couldn't put on a defense, I submit to you. That's what happened.

The Government did put on the fact that there was no Kadison loss. It wasn't the East stock. It wasn't the Hercules. It wasn't the 1560 Construction Company.

I submit to you that the Government did put on a case here and that the Government did prove its case and the defense argument comes down to arguing about some ambiguity in the return.

Well, you have the return. There is no argument on my part that is going to add anything to your knowledge. You can read it. You heard the case.

I still submit to you that the defendant is guilty, and I ask you to return a guilty verdict.

Thank you very much.

APPENDIX F*

THE COURT:

This morning, when you folks weren't here, I commended these lawyers for the way this case has been handled, and now, in your presence, I want to publicly say, repeat what I said this morning.

These lawyers have demonstrated great zeal and skill in the representation of their clients, in the highest tradition, gentlemen, I believe, of the legal profession. They are advocates and they are strong, powerful and, at times, fiery lawyers.

I have the feeling now, as I get ready to charge you on the law in this case, that I have been in the presence of very fine lawyers, and I believe you feel that way. I commend them again for their performance as advocates in the trial of this case.

Now, you have heard all of the evidence in the case, and it is my duty now to charge you upon the law which is applicable to the evidence as you received it from the witness stand and, of course, as it was stipulated to you by these lawyers.

During the course of this trial it was necessary for the Court to make rulings upon Motions and objections, and from time to time the Court may have asked questions of a witness to a little bit more fully develop the facts for your consideration.

It was my purpose then, not to say or do anything that would indicate to you in any way even slightly, how I think this case ought to be decided by the jury. I studiously avoid saying or doing anything that could possibly be construed to mean that.

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*Excerpts from pages 657 through 685, inclusive, Volume 2, Appendix, filed in *United States v. Bursten*, Docket No. 30224, United States Court of Appeals for the Fifth Circuit.

The reason I do that is because I leave entirely to the jury the judgment of the facts in the case. So, if anything I said or did in the trial of this case indicated to any one of you that I feel you ought to make any kind of a certain judgment in the case, you are dead wrong. That was not intended, and I will ask you now to dismiss that from your minds entirely.

I am permitted, as the United States District Judge, to comment on the evidence if I want to, but I don't want to and I never do it. It is your function, and yours alone, in my Court, to decide what is the truth of the case.

It is my duty to manage the trial, to rule upon Motions, to bring the case on to your verdict and then to charge you, as I am doing now, upon the law which is applicable to the evidence as you find it.

Now, just as I have avoided invading your province as the judges of the facts, I will ask you to avoid any attempt of any kind to invade my province as judge of the law.

What I am saying to you now is that it is your duty to take the law the way I charge it to you and to apply it to the facts as you find them in this case and then to resolve the issue fairly and justly, so that when we walk out of this courtroom we will have an abiding feeling inside of us that justice has been done.

It would be a mistake and a violation of your oath if you apply any opinion of law different than from the way I charge it to you.

It is your duty, your sworn duty, to accept the law as I charge it and apply it to the facts as you find the facts.

Now, how do you find the facts in this case? Well, first you consider the testimony of the witnesses, together with the exhibits that have been received in evidence and then you draw such inferences of fact as your experience and your common sense tells you the evidence in the case supports and justifies.

You determine in that way what is the truth in the

case. I will give you these rules to go by, but the job of determining what are the facts in the case is yours and yours alone.

Now, you heard discussion here during the trial of the case from the Court and the lawyers about the burden of proof. Now, I want to talk to you about that subject for a moment.

Members of the jury, the burden of proof is upon the Government to make out and prove to your satisfaction beyond a reasonable doubt each element of the crime charged in this Indictment, and unless that has been done, the jury should find the defendant not guilty.

This is so because the burden or proof rests upon the Government. It never shifts to the defendant. The defendant is under no obligation or duty to prove his innocence.

To put it another way, the defendant in a criminal case under our law is presumed to be innocent until the Government, by competent evidence, has shown his guilt beyond a reasonable doubt. This presumption of innocence remains with the defendant as to each material allegation of the Indictment and each element must be proved until it has been met and overcome by evidence to the exclusion of a reasonable doubt.

If any of the essential elements which are necessary to be proved by the Government in order to establish guilt under this Indictment is not proved beyond a reasonable doubt, you must give the defendant the benefit of that doubt, and in that case it would be your duty to acquit him.

I charge you that a reasonable doubt does not mean every possible doubt, nor does it mean the mere possibility of a doubt. A reasonable doubt is a real doubt, a fair doubt, a doubt which actually arises from the evidence or from the lack of evidence and certainly not from whim or caprice or public opinion or sympathy or any other similar consideration.

My friends, a reasonable doubt is the kind of a doubt which would cause you, as a reasonable person, to refrain from making some decision or from taking some important step in some serious matter in your own private affairs.

If, after you have carefully considered and weighed all the evidence in the case in the light of the law that I am now charging to you, you have a full, firm and abiding conviction amounting to a moral certainty that this defendant is guilty as charged in this indictment beyond a reasonable doubt, then it, of course, is your duty to return a verdict and convict him.

If you do not have a full, firm and abiding conviction to a moral certainty as to his guilt beyond a reasonable doubt, then it is your duty to return a verdict of not guilty and to acquit him.

Thus, although a defendant charged with a crime, begins the trial with a clean slate with no evidence against him, and the law permits nothing but legal evidence presented before the jury to be considered in support of the charge against the accused.

A defendant is never convicted upon mere suspicion or conjecture. He can be convicted only upon evidence that proves to the satisfaction of the jury beyond a reasonable doubt that he is guilty of the crime of which he has been charged.

Since the burden is always upon the prosecution to prove the defendant guilty beyond a reasonable doubt, the defendant has the right to rely upon a failure of the presumption of innocence and upon any failure, if there is any, in the prosecution to carry its burden.

Unless you are convinced beyond a reasonable doubt that all of the elements of the charge have been proven beyond a reasonable doubt, then it is your duty to acquit.

I am going to charge you what those elements are in just a minute. I can't give all of this to you in just one

breath or one fell swoop. I have to give it to you piecemeal, but I have discussed with you, and I hope you understand what I mean when I talk about reasonable doubt. I am talking about a real doubt, a fair doubt, a doubt that arises from the evidence or from the lack of it, and not the mere possibility of doubt.

Now, I have told you earlier, and I repeat now, that you are to calmly, fairly, dispassionately consider all of the evidence in the case, and from it and from the law that I am now charging to you, arrive at your verdict. You must not be swayed by prejudice, bias, sympathy, or public opinion, or any other similar sentiment.

I charge you that all parties stand equal before the law. It doesn't make any difference about color or creed or national origin or whether it is a corporation or an individual or regardless of profession or whether he is a doctor or a lawyer or a carpenter or a mortitian. All parties stand equal before the law in a Court of Justice.

Now, in weighing the testimony and determining the credibility of these witnesses who testified before you, you should take into consideration certain factors. I am going to give you some guidelines to go by, but what I tell you is not all-inclusive, because you may have some tests that are equally as valid as these or even better. I am suggesting to you, by telling you these things, what you ought to think about and how you ought to be guided in judging the credibility or the veracity of a witness from that witness stand.

First, how did he demean himself or conduct himself in your presence, in a way to inspire confidence or not; what interest did that witness have in the outcome of this lawsuit, if any? What opportunity or lack of opportunity did the witness have to observe or see that which he testified about?

Was what he said reasonable or unreasonable in the light of all the evidence in the case? What about the probability or the improbability of its truth or untruth?

Was what he said corroborated or contradicted by other believable evidence in the case?

In this connection, I charge you that the testimony of an agent or officer of the Government is to be subjected to the same tests and given the same consideration as that of any other witness in the case. No more, no less weight, is to be given such testimony because of the official capacity of the witness.

Agents of the Government, public officials are entitled to no greater credibility by reason of the fact that they are agents of the Government or public officials, that is to say, you are entitled and should and must weigh the testimony of each witness, whether he is a Government agent or not, according to the standards which you feel bear upon his credibility.

I am going to tell you something now that is real important. I like to underscore this and put it in capital red letters, but there is no way you can do that, I guess, on your machine, and all that you write on that machine the jury will never read. However, this is important.

In weighing the testimony of each witness and determining the weight and credit that shall be accorded to his testimony, each juror should use his or her good common sense and judgment which he or she has acquired over the period of his or her lifetime in dealing with his or her own personal affairs and the experience gained in the everyday contacts and dealings that you have had with other people.

The fact that one side had more witnesses than the other should not necessarily control your verdict because we don't decide cases on the number of witnesses, nor the volume of evidence. We judge cases on the quality of the evidence—not the quantity but the quality.

The thing for you to decide is what is the probative value, what is the weight of the testimony over the

evidence in question in resolving the issue of the innocence or guilt in this lawsuit. You may decide that one item of evidence in the case has more force and effect than the testimony of a number of witnesses, or you might not.

What I am saying to you is it is the weight of the evidence that counts, don't you see, the weight to prove or disprove the issue of the trial.

I think, gentlemen, that I said that I would read my usual charge on direct and indirect evidence, and both sides agreed to that; is that not true?

MR. WHEELER: Yes, sir.

MR. ALEXANDER: Yes, sir.

THE COURT: Ladies and gentlemen of the jury, it is permissible under the law to prove facts either by direct evidence or by indirect evidence. Direct evidence is the testimony of an eyewitness or some other similar proof. Indirect evidence is proof of a circumstance or circumstances from which the fact to be proved can be inferred.

Indirect evidence is often referred to by folks as circumstantial evidence. I would like to give you an example.

It may be necessary in a particular case to prove that a man took an airplane trip from Chicago to Miami. It may be possible to prove this fact by the testimony of some person who sat next to him or across the aisle from him. This would be direct evidence. This would be eyewitness evidence.

But such proof may be unavailable. It might be possible, however, to prove that a witness saw this man in Chicago at noon on a certain day at the airport in Chicago and it may be possible to prove by another witness that he saw this same man out here at the International Airport in Miami three hours later.

These circumstances would lead to an inference that the man had taken an airplane trip between these two cities, because no other form of transportation that I know of would have brought him down here in such a short time.

This would be proof of the fact of an airplane trip by that man on that day by circumstantial evidence or indirect evidence.

The law makes no distinction between direct and circumstantial evidence. Each type is subject to your scrutiny to determine whether it is trustworthy.

Moreover, in criminal cases, as I have previously instructed you, it is necessary for the Government to prove each element of the offense charged beyond a reasonable doubt, and this test of reasonable doubt applies where the evidence regarding the element is entirely direct evidence or partly direct and partly circumstantial or wholly direct and wholly circumstantial. You consider all of the evidence in the case which you find to be trustworthy and which bears upon the element in question.

This charge on the subject of circumstantial evidence is applicable to any issue in this lawsuit which bears upon the innocence or guilt of this defendant.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or as to his conclusions. However, an exception to this rule exists in the case of an expert witness. A witness who by education and experience has become expert in any art, science or profession may state his opinion as to a matter in which he is an expert and which is relevant and material to the case, and may also state his reasons for such opinion. Juries should consider each expert opinion received in evidence or such expert opinion received in evidence and give it such weight as you think it deserves.

If you find that the opinion of the witness as an expert was expressed without sufficient investigation or knowl-

edge of the material facts and as to forming an accurate opinion, or if you conclude the reasons given in support of the opinion are unsound, you may reject the opinion or give it only such weight as you think it deserves. However, if you find that such opinion is trustworthy and reliable and supported by basic underlying evidence in the case, you may consider it in reaching your verdict.

Members of the Jury, the Court charges you that under our law, a defendant has the right to take the stand and testify in his own behalf if he wants to; and the testimony of such a defendant, in that event, goes before the jury the same as any other testimony of any other witness in the case, to be judged by the same rules.

However, the law does not require or compel a defendant to take the witness stand and to testify, and I charge you that no presumption of guilt may be raised by his failure to do so.

The fact that a defendant does not testify cannot be considered by the jury to its prejudice and should not in any way affect your determination of his innocence or his guilt.

In other words, the Court charges you to completely disregard the fact that in this case the defendant did not take the stand to testify in his own behalf.

The Court charges you that all evidence relating to any statement or admission claimed to have been made by the defendant outside the Court should be considered with caution and weighed with care.

The very nature of a statement claimed to have been made by defendant outside of the Court requires that the circumstances surrouding it be subjected to careful scrutiny to determine whether it was voluntarily and understandingly made and whether it is credible.

If the evidence does not convince you beyond a reasonable doubt that such a statement was made voluntarily and understandingly and/or that it is credible, the jury should disregard it entirely.

On the other hand, if the evidence shows beyond a reasonable doubt that admissions were made voluntarily and understandingly by the defendant, and if the jury believes this to be credible, the jury may consider it against the defendant, as voluntarily and understandingly made, that is, any such statement.

I have already charged as to what is an Indictment. I have told you that an Indictment is simply a charge by which the defendant is brought into a court of law and afforded a fair trial, just like this man has received in this Court, in this trial.

An Indictment is not evidence of guilt, and the jury must not infer anything to his disadvantage or draw any inference against him because he has been indicted. This is so because he is presumed to be innocent until such time, if that time ever comes, when he is proved to be guilty to your satisfaction, beyond a reasonable doubt, of the offense charged in the Indictment in the case.

Now, in this case this defendant plead not guilty, which brought into sharp conflict and controversy the issue of the innocence or guilt under this Indictment.

I want to read to you, if I may, the Indictment in this case so that you may know precisely in the language of the Indictment, what it is that this defendant is charged with having done.

It is charged in the Indictment that

> "On or about the 9th day of May, 1960, in the Southern District of Florida, the Defendant, Leonard L. Bursten, late of Miami Beach, Florida, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1957, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, at Jacksonville, Florida, a false and fraudulent income tax return wherein he stated that he did not have

> any taxable income for said calendar year and that no tax was due and owing, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $152,767.14, upon which said taxable income he owed to the United States of America as income tax of $93,093.40; in violation of *Tital* 26, United States Code, Section 7201."

As I told you, he plead not guilty to that charge and that's the reason that we are here, to determine his innocence or his guilt.

You will notice that the indictment charges that the offense was committed upon a certain date. It is not necessary that the proof establish with certainty the exact date of the alleged offense. It is sufficient if the evidence shows beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged; but, of course, the tax obligation in question here is this defendant's alleged tax obligation for the year 1957.

I charge you, ladies and gentlemen of the jury, that it is not necessary for the Government to prove the amount of income received and the amount of tax owing–that the amount of income received and the income tax owing were exactly the amounts charged in the indictment.

The precise amount of the tax is not the gist of the offense, and the Government is not held to prove exact figures. It will be sufficient if the Government proves beyond a reasonable doubt that there was a willful and knowing attempt to evade a substantial part of the income tax due by him for the year 1957, provided, of course, the other elements that constitute the charge have also been proven to your satisfaction beyond a reasonable doubt.

Members of the jury, the Court charges you that the gist of the offense charged in the indictment is a willful attempt on the part of this defendant to evade and defeat

the tax imposed by the income tax law for the year 1957. To establish the case against the defendant, the Government must prove beyond a reasonable doubt both of the following elements—I've been talking to you about elements that must be charged and I'm going to tell you now what they are—first, that a substantial income tax was due and owing from the defendant in addition to that declared on his income tax return for the year in question; and, two, that the defendant knowingly and willfully attempted to evade and defeat that tax.

I charge you that the phrase "willfully attempt" as used in this law involved two things: First, a specific intent to evade and defeat the tax; and, second, that some act was done in the furtherance of that intent.

This phrase contemplates that the defendant knew that during the calendar year 1957 he had income which was taxable and which he knew he was required by law to report, and that he attempted to evade and defeat the tax thereon or a portion of it.

The attempt to evade and defeat the tax alleged in this indictment is that of filing a false and fraudulent return, with the intent to evade and defeat the tax liability, that is to say, the specific tax intent on the part of the defendant to defraud the Government of the tax due to the Government, and which he knew to be due to the Government.

Two essential elements are required to be proved beyond a reasonable doubt in order to establish the offense charged in the indictment: first, that a substantial amount of Federal Income Tax was due and owing from the accused for the year 1957; and, second, the fact that the accused knowingly and willfully and intentionally attempted to evade and defeat such tax owing for the year 1957.

And the affirmative act which the Government alleges that the defendant committed for the purpose of evading

and defeating his income tax for the year 1957 was the filing of the 1957 income tax return, which is alleged to have been filed by him, knowing that he owed the tax, and which was alleged to be fraudulently filed, with the intent to evade and defeat the tax.

Now, that income tax return is Government Exhibit No. 6 which, of course, will be available to you for your inspection when you go out.

Now, what is the law under which this indictment has been brought and this defendant is being prosecuted? It is Section 7201 of the Internal Revenue Code of 1954, and the pertinent part of that law reads as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax or the payment thereof shall, in addition to other penalties provided by law, be guilty of an offense against the United States."

You recall a few moments ago or, perhaps, several times I used the word "substantial." I want to define that word for you. The meaning of the word "substantial," as is here used, depends upon the facts, circumstances, and the conditions shown by the evidence of each case as it is being tried.

Any amount of unreported taxable income or tax greater than sums relatively small, under the particular circumstances, pertaining thereto, would be substantial.

Now, you will remember that I have used the word "willfully." Now, I want to define that term for you and explain it to you. It has to do with the requisite criminal intent; the question of intent is a matter for you, as jurors, to determine.

Intent is, of course, a state of mind and it is not possible to look into a man's mind to see what went on at a given time and place.

The only way you have of arriving at the intent of a defendant is for you to take into consideration all of the facts and circumstances shown by the evidence and determining from all such facts and circumstances whether it was the intent of the defendant at the time in question to defraud the Government of the tax which he then knew was due from him; thus, direct proof of willful or wrongful intent or knowledge is not necessary because it is often impossible; intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although such act or acts, standing alone, may seem unimportant. These are questions of fact to be determined by the jury from all of the evidence in the case.

I charge you that the attempt to evade or defeat the tax must be a willful attempt, that is to say, it must be an attempt made voluntarily and intentionally, and with the specific intent to keep from the Government a tax under the law, a tax which the accused then knew was owing and due to the Government; or, in any event, a tax which he had to pay under the law.

In other words, the attempt must be made, if it is made at all, with bad purpose and an evil design of willfully seeking to defraud the United States Government of some substantial amount of income tax lawfully due from the accused to the Government.

Ladies and gentlemen of the jury, I charge you that if a person in good faith believes that he has paid all the tax he owes, if any, he cannot be guilty of a criminal intent to evade the tax. If a person acts without any reasonable grounds for belief that his conduct is lawful, it is the duty of the jury to decide whether he did or did not act in good faith, or whether he willfully intended to evade and defeat his tax.

This issue of intent as to whether the defendant willfully attempted to evade or defeat the tax is one

that the jury must decide from a consideration of all the evidence in the case which bears upon the defendant's state of mind with which he committed the alleged act.

On the question of intent to evade and defeat income taxes, there are certain matters which you may consider as pointing to such intent—if you find that they exist in this case. The following illustrations are not all inclusive, but they may help you: First, was there a concealment of assets; two, was there a covering up of sources of income; third, what about the handling of the defendant's affairs—did he do so in a manner so as to avoid the making of usual records; four, you may consider any and all other conduct, the likelihood of which would be to mislead or conceal or deceive the Government.

I have given you these instances simply to illustrate the type of conduct from which you may infer the intent to evade taxes. If the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purposes.

My friends on the jury, I charge you that whether there is a loss—whether there is a loss on the sale of stock is measured by the difference between the amount received for the stock and the cost or basis of the stock to the taxpayer. In determining the extent of the loss on a sale of stock, the loss may not exceed the cost or the basis of the stock. In general, to be deductible for tax purposes, losses must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the year the loss is claimed.

Losses must be taken in the year incurred, and neither the Government nor the taxpayer has an option to defer their deduction.

In determining the extent and deductibility of a capital loss in a taxable year, the capital losses are deductible

only to the extent of capital gains, plus $1,000 of ordinary income.

Any excess of capital losses, which cannot be deducted in the taxable year, may be carried forward for a maximum period of five years.

Now, you have heard evidence in this case concerning a payment to the defendant in 1957 of $160,000, arising out of a transaction which the defendant had with Irving and Hyman Green, and you have seen evidence that this payment less certain expenses, which are not in issue in this case, was reported in the defendant's 1957 income tax return, which is Government Exhibit No. 6, as a capital gain.

A capital gain is subject to a maximum tax of 25 percent under the law.

If you find that the defendant received this money in 1957 as compensation for services which he had performed, then I instruct you that the defendant had ordinary income, and that it was not a capital gain.

On the other hand, if you find that the defendant received this payment because of the sale to the Greens of an interest in real property, then I instruct you that the defendant's reporting of this transaction as producing a capital gain was correct.

If you find beyond a reasonable doubt from the evidence in the case that the defendant knowingly and wilfully filed a false and fraudulent income tax return for the year 1957, with the specific intent to evade or defeat a substantial part of the tax, which he then knew he owed to the Government, then the offenses of which he is charged would have been completed on the date when such a fraudulent return was so filed.

Now, ladies and gentlemen of the jury, I have told you heretofore not to discuss this case among yourselves. I will now ask you to do a 180-degree turn and tell you to go into this jury room and to discuss this case among yourselves, up one side and down the other.

I charge you to do that with a disposition to accept the views expressed by your fellow jurors, if what they say is based upon the evidence, if it is not contrary to the charge that I have given you upon the law and if it is persuasive.

Now, it would be wrong for you to walk into the jury room and say, "I have made up my mind." That is not the essence of the jury system. The essence of the jury system is that you will, together, discuss and consider all of the evidence in this case that bears upon the innocence or guilt of this defendant and that you will do that after the fashion that I have just suggested, that you should be willing to accept the views of your fellow jurors if what they say is based upon the evidence and the law and is persuasive.

However, this does not mean that after having heard and considered all of the evidence in this case, that if you have a fixed, abiding conviction about the case, that you ought to surrender it just to get along with your fellow jurors and return a unanimous verdict; it doesn't mean that at all. That would be a violation of your oath, too.

It is necessary, of course, for you to return a unanimous verdict, meaning that all 12 jurors must concur unanimously in the verdict returned.

Now, as soon as you go out to the jury room it will be your duty to select one of your number to serve as your foreman. Your foreman will then preside over your deliberations and he or she will be your spokesman here in the courtroom hereafter.

Now, do not attempt to contact the Court except by written Memorandum, signed by your foreman, whoever he or she may be. The way to do that is, if you have something you want me to consider, write that out on a sheet, on a yellow pad, and hand it to the Clerk, and he will bring it to me and I will assemble the lawyers, and we will discuss it and then call you.

Now, do not try to contact the judge in any other way and, for heavens sake, don't ever announce how you stand numerically or otherwise until after you have reached a unanimous verdict and have returned it to the courtroom and has been received and published in this courtroom and filed in this cause—not even the Marshal or the Clerk or anybody else is to know. That is private until that verdict has been received and published.

Now, I have done my level best to explain to you the law which is applicable to the evidence in this case.

This is a rather unusual and complex tax case and taxation is not the easiest subject in the world to explain and understand, but I have tried to reduce this to the language that can be explained to you and understood by people who are not tax experts, who are just ordinary folks.

I must tell you that I have had the very capable assistance of these fine lawyers in the preparation of this jury charge and I do acknowledge and thank them for that.

Now, have I laid this charge out for you so that you understand it? Is there any portion of it now that you would like to have me read before you go out there to deliberate your verdict?

If there's anyone that has any section or portion of this charge that you would like to now have me re-read because you don't understand it, raise your hand, please.

(Thereupon the jury indicated in the negative.)

THE COURT:

Thank you.

Now, it is contrary to my policy to read back evidence. You may remember that I told you several times that it is your recollection of the evidence that counts, and once in a while a jury will come back in after sending me a note and they will say "Judge, we would like to have the

testimony of a certain witness read or re-read." I don't do that, and there is a valid reason for it; if you read the testimony of one witness or a portion of that witness' testimony, you have to read it all.

Then after you have read that, why, perhaps you have to read the testimony of another witness, and we get into a reading contest around here, and we will be here as long reading as we would be here in the trial of this case.

It is your recollection of the evidence in the case that counts, not the lawyer's, but yours, not your fellow jurors', but yours.

Now, if they refresh your recollection and you recognize that what they say is right then, of course, you would be obligated to accept what they say.

I have a verdict form prepared and it is styled in this Court and in this case and it reads "We, the jury, find the defendant, Leonard L. Bursten"– then there is a line there–"Not Guilty" and a line "Guilty," and whichever one is your verdict, unanimous verdict, you will check that, that is, your foreman will.

Then your foreman will sign his or her name down here at the bottom, and there is a place here, March, 1970, if you reach a verdict this afternoon, which is possible, of course–it would be March 26, and I will ask your foreman to put the date in–Mrs. Suter, would you remind the foreman to sign his or her name and put the date in there?

JUROR SUTER:

Yes, sir.

THE COURT:

And when you have reached a unanimous verdict, have your foreman knock on the door and we will receive you in the courtroom and receive your verdict.

Ladies and gentlemen of the jury, you are entitled to take to the jury room with you for your inspection and

consideration each item that has been received in evidence in this case.

Now, lawyers, I will ask you, please, to stand by the Clerk to personally inspect each item before it is sent to the jury room so that we might be absolutely sure that nothing goes to the jury room that is not evidence.

Some of these items were identified but not received in evidence, don't you see.

Gentlemen, I have had my Clerk prepare a copy of the Indictment. Certain portions of it that shouldn't be there have been eliminated.

I would like for you to look at it and if you don't have any objection to that, why, we can send the copy of this Indictment together with the items that have been received in evidence, along with the verdict form to the jury when they retire.

Is that agreeable to both sides?

MR. ALEXANDER:

Agreeable with the Government, sir.

MR. WHEELER:

It is agreeable to us, your Honor.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1455

LEONARD L. BURSTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) [1] is reported at 453 F. 2d 605.

JURISDICTION

The judgment of the court of appeals was filed on December 28, 1971 (Pet. App. 16). A petition for

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[1] "Pet. App. " refers to the separately bound "Appendixes" (continuously paginated) filed with the petition. "R." references are to the record appendix filed in the court of appeals (No. 30224).

rehearing was denied on March 9, 1972 (Pet. App. 17). On March 30, 1972, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to May 8, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain remarks of the prosecutor in closing argument to the jury constituted an impermissible comment on petitioner's failure to testify and, if so, whether the error was cured by the instructions given to the jury.

STATEMENT OF THE CASE

Petitioner, an attorney (R. 361), was convicted after a jury trial (R. 835-837), for willfully attempting to evade $93,093.40 in tax liability on a 1957 income tax return (R. 122, 143-148) which petitioner filed in 1960, and in which he claimed a $160,000 capital gain from the sale of certain real estate and a $140,000 carry-over capital loss allegedly suffered in connection with a 1950 investment in Kadison Corporation.

In the first trial on this indictment, petitioner testified that the $140,000 capital loss arose, not out of his investment in Kadison Corporation, but out of a transaction in 1957, wherein he gave his wife a $140,000 interest in real estate to satisfy her demand for restitution of eleven shares of East Corporation stock which he had borrowed from her and lost by foreclo-

sure after pledging them as collateral for a personal loan. An attorney, William J. Goldworn, testified for petitioner in the first trial that he had participated in this 1957 transaction and had advised petitioner that the $140,000 item could properly be claimed on his return as a capital loss. The first trial resulted in a conviction which was reversed by the court of appeals because of the district court's prejudicial comments and its refusal to instruct the jury that reliance by petitioner on advice of competent tax counsel would be a defense. *Bursten* v. *United States*, 395 F. 2d 976 (C.A. 5).

At the outset of the retrial proceedings, petitioner's counsel informed the jury in an opening statement that the evidence would show the $140,000 transfer to petitioner's wife, and that petitioner had relied on Goldworn's advice in claiming the capital loss (R. 94-104). The government's evidence tended to prove, first, that the $160,000 received by petitioner in 1957 allegedly from sale of a tract of land actually constituted regular income for personal services (R. 95, 199-204, 281-282). Second, as to petitioner's reported capital loss, the government's evidence tended to prove that, in prior audits of petitioner's tax returns for 1952, 1953 and 1954, petitioner had claimed and had been allowed a $3,800 capital loss arising out of the Kadison investment, and had claimed certain other losses which had been allowed, but only to the extent that $4,084.40 had been left as a loss carryover for 1957 (R. 187-199). At the conclusion of the

government's case, petitioner rested his own case without calling any witnesses or introducing any evidence (R. 486).

Petitioner's counsel, in his closing argument to the jury, stated that petitioner had decided to introduce no evidence on the $140,000 loss because the government, in what counsel suggested was an attempt at concealment, had failed in its duty to produce all the witnesses and specifically failed to produce the particular revenue agent who was assigned to examine the 1957 tax return (R. 639-642).[2] On the reported gain from the sale of land, he argued (R. 631-633) that the sales agreement was conclusive in reciting that petitioner was paid $160,000 for a property interest and that it refuted the testimony of the government's witness, Jack D. Burris, who had testified that he had acted as legal adviser for petitioner's co-venturers and that petitioner was paid by them for personal services (R. 246, 281-282) in promoting the real estate transaction.

In his reply argument, the prosecutor asked the jury to compare the opening statements with what the government had proved (R. 652) and, upon defense objection, the court instructed the jurors (R. 653) to follow its prior instructions[3] to base their verdict on the

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[2] This agent, Bernard Jaffe, was present at the trial under government subpoena (R. 64, 810, 814). Prior to the trial, petitioner's counsel interviewed Mr. Jaffe and was furnished his official reports (R. 814; Supp. R. 74-77).

[3] The court had previously warned the jury that statements of counsel were not evidence (R. 73). A similar admonition was included in the charge (R. 683).

evidence and the court's charge on the law. The prosecutor thereafter said (R. 654):

> There is one other point in that connection. I submit to you that the defense panicked in this case. I submit to you they didn't think the Government could do it. It did go back some years. Kadison showed up. Sawyer showed up. Burris showed up. Adcock showed up. They panicked. They couldn't put on a defense, I submit to you. That's what happened.
>
> * * * *
>
> I submit to you that the Government did put on a case here and that the Government did prove its case and the defense argument comes down to arguing about some ambiguity in the return.

A defense objection and motion for a mistrial (rather than for curative instructions) was denied by the district court for the following reason (R. 656):

> The basis for the ruling is that Mr. Wheeler several times in his argument to the jury explained to the jury, in sort of a short, crisp and cursory way, that it wasn't necessary for them to put on any case for certain reasons, and I feel that that opened up and made proper—I won't say proper, but legitimatizes the comment made by counsel for the Government.

The district court, on the ground that it was already covered in the court's prepared charge (R. 589-594, 740) denied petitioner's request (Pet. 3-4; R. 740) to instruct the jury on the government's burden to prove the offense beyond a reasonable doubt and on a defendant's right to rest his case without producing evidence and to do so free of adverse inferences

based on his exercise of that right. The district court repeatedly gave correct instructions on the government's burden of proof (R. 599-600, 660-662, 667, 669, 670, 672, 674). The jury were instructed fully on a defendant's right not to testify and on the jury's duty to attribute no significance to his exercise of that right (R. 669), and it was instructed that the "defendant is under no obligation or duty to prove his innocence" (R. 660). Petitioner's counsel repeatedly reminded the jury that petitioner was exercising these rights in this case (R. 625, 639, 641, 642, 643) and the prosecutor freely acknowledged that the government's burden of proof remained constant to the end of the trial (R. 601-602). In response to the court's request for suggestions on additional charges, petitioner's counsel stated he was "absolutely satisfied" with the court's charge to the jury (R. 686, 801-802, 804-806).

The court of appeals affirmed, holding that the prosecutor's "comments did not constitute prejudicial error and are harmless beyond a reasonable doubt" (Pet. App. 13).

ARGUMENT

1. Contrary to petitioner's interpretation (Pet. 5), the opinion of the court of appeals approved as free from error (Pet. App. 11) the prosecutor's argument that the jury should recall the opening statements and compare them with the evidence in the case. The court of appeals correctly held that a prosecutor may remind the jury that an opening statement by defense

counsel, which is not evidence, is not supported by the evidence. *United States* v. *Broadhead*, 413 F. 2d 1351, 1361-1363 (C.A. 7), certiorari denied, 396 U.S. 1017. The instructions to the jury (R. 669), stating at length that the jury should not consider petitioner's silence, effectively dispelled any possible ambiguity in the prosecutor's remarks.

2. Petitioner errs in his contention (Pet. 5, 6) that the prosecutor, in arguing that "the defense panicked" and "couldn't put on a defense," "pointedly invited the jury to draw adverse inferences from Petitioner's silence." Petitioner's counsel conceded below (R. 811, 813) that these remarks were of a "mixed" nature, and the district court regarded them as a permissible reply to the argument of defense counsel. The potential witnesses whom petitioner did not call included his wife and Goldworn, his tax attorney. In view of these persons' potentially decisive knowledge and testimony, their absence justified an inference adverse to petitioner. *Ford* v. *United States*, 210 F. 2d 313, 317 (C.A. 5); *United States* v. *Welp*, 446 F. 2d 867, 868 (C.A. 9). The challenged argument was not a comment on defendant's silence. *United States* v. *Cox*, 428 F. 2d 683, 688 (C.A. 7), certiorari denied, 400 U.S. 881; *Jacobs* v. *United States*, 395 F. 2d 469, 477 (C.A. 8); *United States* v. *Cedar*, 437 F. 2d 1033, 1035 (C.A. 9). There is no merit in petitioner's contention (Pet. 2) that the decision below is in conflict with the First Circuit decisions in *Rodriguez-Sandoval* v. *United States*, 409 F. 2d 529, 530-531, and in *Desmond* v. *United States*, 345 F. 2d 225. Both cases

involved insistent, repetitive argument by a prosecutor that narcotics agents' testimony about narcotic sales to the defendants stood uncontradicted. In *Rodriguez-Sandoval*, the district court's general instructions on a defendant's right of silence were held to be "vague" and in *Desmond* the court of appeals emphasized the complete absence of any possible witness other than the two defendants who might have been objects of the argument.

3. The court of appeals correctly held (Pet. App. 13) that the prosecutor's remarks, even if erroneous, were rendered harmless because of the repeated instructions that closing arguments were not evidence and that a verdict was to be based solely on legally competent evidence. See, *e.g.*, *United States* v. *Toler*, 440 F. 2d 1242 (C.A. 5); *United States* v. *Broadhead*, *supra*. The instructions were adequate to enable the jury to avoid erroneous reliance on inferences from defendant's silence.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1972.

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No. 71-1455

AUG 16 1

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD L. BURSTEIN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

**Petition For A Writ of Certiorari To
The United States Court of Appeals
For The Fifth Circuit**

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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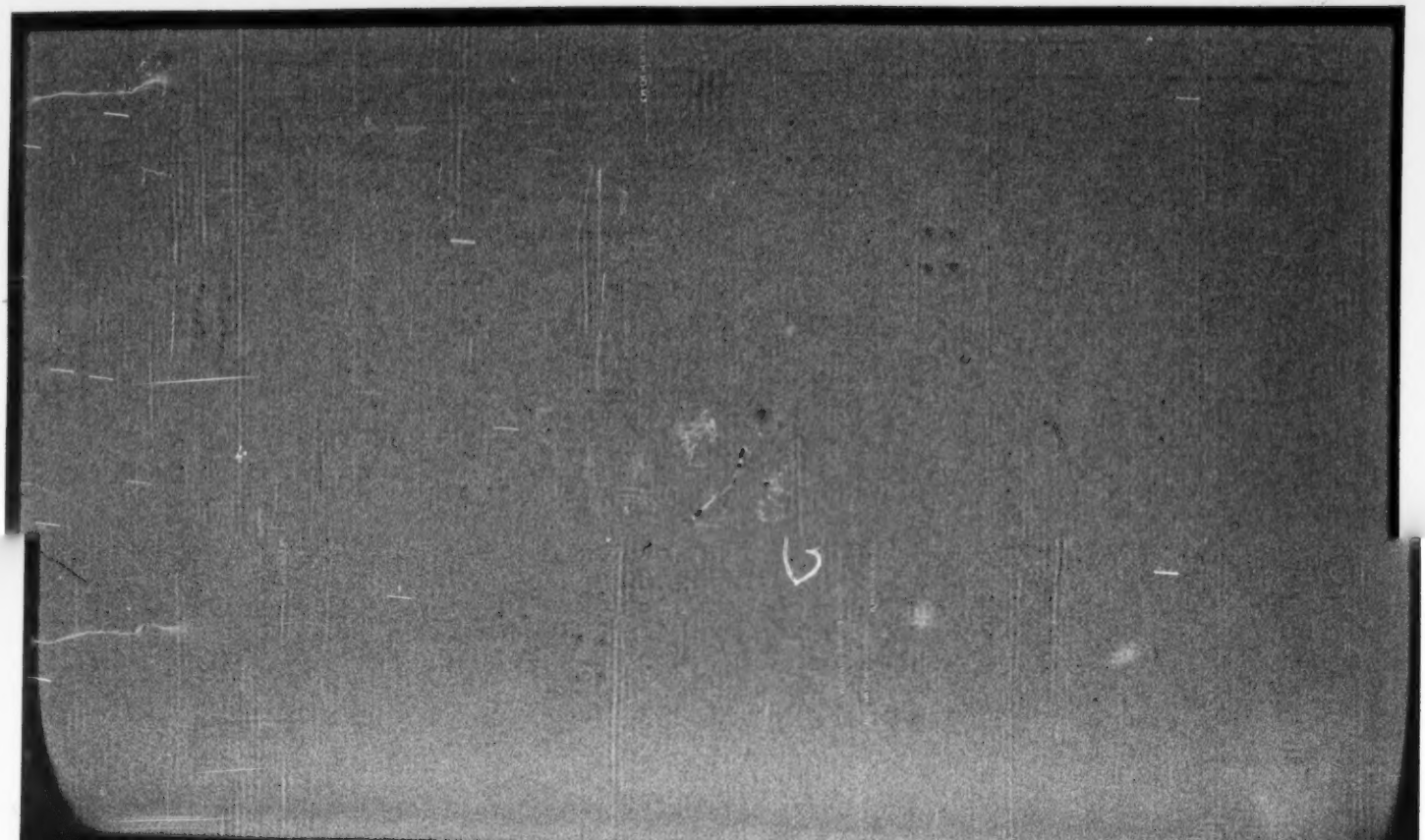

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1455

LEONARD L. BURSTEN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

Petition For A Writ of Certiorari To
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PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

Where, as here, a prosecutor comments on an accused's failure to testify, and the trial court neither grants a timely defense motion for a mistrial nor instructs the jury to disregard the comments, the prejudicial impact of the remarks cannot be dispelled by routine jury instructions which make no reference to the offending comments, but simply state that "closing arguments [are] not evidence" and the verdict should be based "solely on legally competent evidence." By ruling that such proscribed comments were "cured" by the trial court's general jury

instructions, unrelated to the specific comments, the Fifth Circuit has impaired the constitutional protection established in *Griffin v. California*, 380 U.S. 609 (1965), and has created a conflict with the decisions of the United States Court of Appeals for the First Circuit in *Desmond v. United States*, 345 F.2d 225 (1965) and *Rodriguez-Sandoval v. United States*, 409 F.2d 529 (1969).

In its Brief in Opposition, the United States does not dispute the importance of the question presented, but instead, attempts to recast the facts of the case by running together a discussion of events at Petitioner's earlier trial with the offending prosecutorial remarks made at Petitioner's second trial. The irrelevance of events at the first trial is plain. The jury which heard the prosecutor charge that Petitioner had "panicked," knew nothing of the earlier trial. See, *Desmond v. United States, supra*, at page 227. In a further effort to divert inquiry from the significant constitutional issues present, the Government suggests, albeit obliquely, that Petitioner's counsel may have waived objection to the prosecutor's infringement of Petitioner's Fifth Amendment right not to testify. (page 6, Brief in Opposition). As pointed out in the Petition at page 5, Petitioner's counsel promptly objected to the prosecutor's remarks and moved for a mistrial. The objection was overruled and the motion was denied. Plainly, Petitioner's position was timely brought to the trial court's attention, and neither on the motion for new trial nor on appeal[1]

[1] Brief for Appellee in *United States of America v. Bursten*, No. 30,224, United States Court of Appeals for the Fifth Circuit.

did the Government make a claim that Petitioner waived his objection.[2]

With its outside the record discussion of events at the first trial, the Government couples its contention that the charges of "panic" and "inability to put on a case" did not refer to Petitioner's silence. The contention is without merit. Dispositive is the fact that both the trial court and the Court of Appeals recognized that in the context of *this* case, the prosecutor's rebuttal argument statements that "the defense panicked" and "couldn't put on a defense" invited the jury to draw adverse inferences from Petitioner's silence. The trial court revealed that it linked Petitioner's silence and the defense's failure to put on a case by equating Petitioner's requested instruction on the absence of defense testimony (which was rejected) with an instruction on Petitioner's own right not to testify. (App. D, p. 21). Similarly, the Court of Appeals noted the linkage:

> . . . The prosecutor's comments of "panic" and "inability to present a defense" . . . conceivably asks the jury to conclude that *appellant had panicked* because *he* had no case . . . [App. A, p. 11; emphasis added]

Because it was not "apparent on the record that there was someone other than himself whom defendant could have called"[3] and that it was this someone else who panicked, the prosecutor's remarks of necessity pointed to Petitioner.

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[2]It should be noted that even if objection had not been made the error here was "plain error" within the meaning of Fed. R. Crim. P. 52(b). See, *Rodriguez-Sandoval v. United States, supra*, at page 531.

[3]*Desmond v. United States, supra*, at page 227.

There is likewise no merit in the Government's efforts to distinguish this case from the above cited decisions of the First Circuit. It is absurd to suggest, as the Government does in its Brief, that the cases can be reconciled on the quantum of prejudicial commentary. The factual difference that the improper comments in *Rodriquez-Sandoval* were repeated five times, while here the prosecutor charged that Petitioner "panicked" "only" two times hardly explains away the conflict in decisions. Nor does the Government succeed in reconciling the decision below with that of the First Circuit in *Desmond v. United States, supra.* In *Desmond,* although the trial court clearly and unequivocally charged on the defendant's right not to testify, the First Circuit held that these general instructions did not "cure" the error inherent in the prosecutor's comments that certain evidence stood "unimpeached and uncontradicted." To dispel the prejudicial effect of such improper comment, as this Court has held, a "direct prohibition or emphatic condemnation" is required. *Wilson v. United States,* 149 U.S. 60, 67 (1893).[4] The ineffectiveness of the supposed "cure" in the instant case is more marked than in either *Desmond* or *Rodriguez-Sandoval.* Here, unlike in *Desmond* and *Rodriguez-Sandoval,* the prosecutor's remarks not only called attention to Petitioner's silence, but went on to ascribe a "guilty fear" of testifying as the reason for the silence. On the record in this case, the conflict with the decisions of the First Circuit is clear.

Significantly, the Brief in Opposition ignores the serious and eroding implications of the Fifth Circuit's decision on *Chapman v. California, supra.* In its opinion

[4]See also, *United States v. Handman,* 447 F.2d 853, 855 (7th Cir. 1971); *Desmond v. United States, supra,* at 226-227; *DeMayo v. United States,* 32 F.2d 472, 475 (8th Cir. 1929).

here, the Fifth Circuit held that the prosecutor's rebuttal statements "did not constitute prejudicial error" under *Chapman v. California, supra,* because the error inherent in such comments was cured by the District Court's routine instructions–delivered without regard to the offending comments–"that the closing arguments were not evidence and that the jury should base its verdict solely on legally competent evidence." The Fifth Circuit's decision treats as "cured" (*i.e.*, harmless beyond a reasonable doubt) constitutionally proscribed prosecutorial closing argument whenever the trial court, at some point, tells the jury that "closing arguments [are] not evidence" and that the verdict should be based "solely on legally competent evidence." Such an approach unrealistically assumes that a jury will interpolate from such general instructions a specific instruction to disregard a particular, but unmentioned, comment. If correction of constitutional error requires no more, the "harmless beyond a reasonable doubt" standard of *Chapman* is a nullity.

CONCLUSION

For the reasons stated herein and in the Petition, a Writ of Certiorari should be granted in the instant case.

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